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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

YER YANG,

Defendant and Appellant.

A117341

(Humboldt County  
Super. Ct. No. CR035533)

In re YER YANG,

on Habeas Corpus.

A123786

Yer Yang (Yang) was convicted, following a guilty plea, of unlawful intercourse with a minor more than three years younger than himself and oral copulation with a minor. Both in his appeal and in a consolidated “Petition for Writ of Habeas Corpus, Mandate and/or Prohibition,” Yang contends that the trial court improperly ordered discretionary sex offender registration after striking Yang’s mandatory registration requirement based on the California Supreme Court’s holding in *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), and that the court’s discretionary registration order that he register as a sex offender violated his rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) to a jury trial and proof beyond a reasonable doubt of facts used to increase punishment. In addition, in his appeal only, Yang contends that, even if the court had jurisdiction to impose the discretionary registration requirement, (1) he was nonetheless denied a fair hearing on his motion to be relieved of the registration

requirement, and (2) the court, in exercising its discretion, failed to apply the proper standard. For the reasons discussed in this opinion, we will treat Yang's appeal and petition, together, as a petition for writ of mandate and shall reject all of his contentions and deny the petition for writ of mandate.

### ***PROCEDURAL BACKGROUND***

On November 26, 2003, Yang was charged by information with rape by force (Pen. Code, § 261, subd. (a)(2)<sup>1</sup>—count one); unlawful sexual intercourse with a minor more than three years younger than himself (§ 261.5, subd. (c)—count two); and oral copulation with a minor (§ 288a, subd. (b)—counts three and four).

On April 26, 2004, Yang pleaded guilty to count two (unlawful intercourse with a minor more than three years younger than himself) and count three (oral copulation with a minor) and waived his appeal rights in return for three-year concurrent prison sentences and the dismissal of counts one and four. Also on April 26, 2004, Yang was sentenced to a total of three years in state prison, with 300 days of presentence credits. Yang was also ordered to register as a sex offender, pursuant to section 290, for the oral copulation count.

Yang apparently was initially released from prison to parole in June 2005. On June 2, 2006, however, while still on parole, he was convicted of felony vandalism (§ 594, subd. (b)), and sentenced to 16 months in state prison. He was released again to parole on January 31, 2007. He was finally released from parole on March 2, 2010.<sup>2</sup>

On November 20, 2006, while in prison, Yang filed a motion for correction of sentence to delete the mandatory sex offender registration requirement. On March 2, 2007, the trial court struck the mandatory registration requirement and, on March 23, 2007, ordered discretionary registration.

On March 28, 2007, Yang filed a notice of appeal.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> On April 5, 2010, at Yang's request, we dismissed the California Department of Corrections and Rehabilitation, Division of Adult Parole Operations, as a respondent in this matter, in light of Yang's release from parole.

On January 16, 2009, Yang filed a “Petition for Writ of Habeas Corpus, Mandate, and/or Prohibition.”

### ***FACTUAL BACKGROUND***

The preliminary hearing formed the factual basis for the plea. The sole witness at that hearing was Eureka Police Detective David Parris, who testified pursuant to section 872, subdivision (b),<sup>3</sup> to numerous statements by others, including three statements by the victim, “Jane Doe.”

Parris spoke with 14-year-old Jane Doe on the early morning of September 7, 2003. She was upset and had been crying. Parris also spoke with Jane’s mother, who said she had dropped her daughter off at about 1:00 that morning at the marina (or docks) on Marina Drive, a gathering place for young people in Eureka. She understood that Jane would get a ride home from friends.

The following morning, Parris attended a CAST (Child Assault Services Team) meeting, at which Jane was interviewed by a social worker cross-trained as a forensic interview specialist. Jane told the social worker that her mother had dropped her off at the docks at about 12:30 a.m., with the understanding that Jane would obtain a ride home from a friend about 45 minutes later. She said that there were people there drinking alcohol, but she drank a Coke. At some point, she climbed into the back seat of a small red sedan to have privacy while making a phone call to her mother, but was unable to make the call because her cell phone battery was low. While she was still in the car, two Asian boys climbed into the back seat, one on each side of her. Then two more Asian boys got into the front seats. Jane did not know any of their names. She asked them to let her out, but they refused. She then saw a friend outside the car and asked her to tell the boys to let her out. But the car started and was driven away.

The car stopped at the foot of Del Norte Street. Everyone got out of the car and two of the boys grabbed Jane’s arms and followed the other two boys to a nearby area;

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<sup>3</sup> Subdivision (b) of section 872 permits a finding of probable cause to be based on the sworn testimony, including hearsay, of certain law enforcement officers.

one of them brought a blanket from the car. Jane went with them because she believed she had no choice. One boy said he wanted Jane to “give him head,” but Jane refused. They threatened to beat her up if she did not do it, forcing her eventual compliance. Some of the boys dropped their pants and approached her with their exposed penises. One of them placed his penis in her mouth, but she pushed him away. A second boy then placed his penis in her mouth.

The boys told Jane to take her clothes off. She fell while undressing and one boy pushed her down and climbed on top of her. She was on her period and the boy pulled her tampon out, dropped it on the ground, and placed his penis inside her vagina. Several other boys walked up at this time. While she was being penetrated, another boy grabbed her leg and others were grabbing her breast area. Jane heard another boy say it was his turn and the first boy pulled his penis out of her. The second boy then got on top of her and put his penis inside of her. She pushed him away and he pulled his penis out. After the second boy pulled out of her, the first boy penetrated her again. One or both of the two boys wore a condom.

Jane said she was afraid to resist the attacks for several reasons: there were eight or nine Asian boys around her, she had been verbally threatened that she would be hurt if she resisted, she heard one of them say he had a knife, and at least one of the boys knew where she lived.

After the assaults, all of the boys left and Jane gathered up her clothes. Her shirt was missing so she picked up the blanket and wrapped herself in it before walking back towards the road. She began walking east along the road when she was stopped by a local correctional officer, who asked if she was okay. Jane told her she had just been raped and the officer notified police. It was about 3:30 a.m. at that point.

After the CAST interview, Parris went and interviewed some witnesses, and then interviewed Jane later that afternoon. He asked whether she had drunk any alcohol. She said she remembered drinking Coke; she may have had some alcohol, but if so, very little. Jane also said she had “flashed” the crowd at Marina Drive before the assault

occurred. By “flashing” she explained that she had pulled up the front of her blouse and shown her breast area before pulling the blouse back down; she was wearing a bra.

Parris also showed Jane a series of photo lineups. She identified Yang, who was 18 years old at the time of the incident, as one of the people who raped her. She also identified S.H. as the other rapist and one of the people who put his penis in her mouth, K.B. as a person who placed his finger in her vagina, C.Y. as the driver of the car, James P. as the person who held her leg, and Chris R. as one of the people present during the attack. Jane said she did not recall any sexual acts occurring at the marina before she was driven to the Del Norte area.

Parris re-interviewed Jane shortly before the preliminary hearing, on November 12, 2003, at which time Jane told him that, after flashing, several people taunted her to orally copulate people there. She felt compelled to do so, and therefore did orally copulate an individual there. During all of the interviews with Jane, she made it clear that she engaged in the acts of intercourse out of fear and without her consent.

Parris testified that he had interviewed C.Y. as part of his investigation. C.Y. said he was present at the docks on the early morning in question. He saw Jane flash the group of people—who were his friends—and then heard someone say something like, “Give ‘em a blow job. Give ‘em a blow job.” He then saw Jane orally copulating S.H. By the look on her face, C.Y. did not think Jane wanted to be doing what she was doing.

After that, Yang and S.H. asked C.Y. to drive them somewhere. They may have also mentioned that Jane would be coming with them. C.Y. initially said no, but ultimately drove S.H., Yang, K.B. and Jane to the foot of Del Norte. After they got out of the car, S.H. and Yang asked C.Y. to retrieve the blanket that was in his car. They all then began to walk to the south of the parking lot. Once there, someone told Jane, “You started it, you finish it.” She responded, “No. Take me home.” C.Y. tried to get them to take Jane home, for fear that they would all get in trouble, but they stayed.

According to C.Y., Jane orally copulated S.H. and Yang. They then told her to take her clothes off. She initially refused and then felt compelled to do so. K.B. also touched Jane’s body, as did someone named Tao. At that point, James P., Chris R., and

others arrived at the scene. C.Y. then saw Yang and S.H. put on condoms. They told Jane to lie down. After she did so, James P. held her leg while S.H. put his penis inside her vagina. He stopped about five minutes later and Yang penetrated Jane's vagina for five to 10 minutes. After Yang pulled his penis out, S.H. again placed his penis inside Jane's vagina. He later said, "I came," got off of Jane, and threw his condom on the ground. Jane began to pull her clothing on. As people began to leave the area, C.Y. saw someone throw a piece of Jane's clothing into the bushes.

Parris also interviewed Chris R., who said that he saw Jane orally copulate Yang and S.H. while still at Marina Drive. He also heard Jane say, "We'll finish this later." Chris then saw them leave in C.Y.'s car. He later heard where they had gone and went to the foot of Del Norte with James P. and one other person. When he arrived there, he saw Jane orally copulate S.H. and Yang again. He also saw C.Y. and another person touching Jane's breast. Chris heard someone say, "let's fuck," and then heard people tell Jane to take her clothes off. She refused, saying she had a boyfriend. Chris then saw S.H. and Yang, both of whom wore condoms, having intercourse with Jane while James P. held down her leg. Chris also saw C.Y. touching Jane and saw K.B. touching her breast while S.H. was penetrating her.

Parris interviewed K.B., who also saw Jane orally copulating Yang and S.H. at the docks. After initially denying going in C.Y.'s car to the foot of Del Norte, K.B. later admitted that he was in the car with C.Y., Jane, S.H., and Yang. Once at the location of the assaults, K.B. heard S.H. say, "Suck my dick again." He then saw Jane orally copulate S.H. and Yang again. Both Yang and S.H. told Jane to take off her clothes, which she eventually did. Yang and S.H. then put on condoms and tried having intercourse with her, but "couldn't get it in." Jane was saying, "No. No. I have a boyfriend." K.B. then walked away.

Parris further testified that several witnesses saw Jane's mother return to the dock area to look for Jane while Jane was still there. Some witnesses thought Jane got into C.Y.'s car to hide from her mother. Someone also said they heard Jane say she was a "porn star" while at the dock. Two witnesses saw Jane drinking at the dock; one of them

thought she was intoxicated. Witnesses said many people were drinking at the dock. Jane's blood alcohol level, obtained shortly after the assaults, was .05percent. Two discarded condoms were found at the scene of the assaults.

## ***DISCUSSION***

### ***I. The Trial Court's Jurisdiction to Strike the Mandatory Sex Offender Registration Requirement and Order Discretionary Registration***

Yang contends the trial court improperly ordered discretionary sex offender registration after striking his mandatory registration requirement based on the California Supreme Court's holding in *Hofsheier*, *supra*, 37 Cal.4th 1185. According to Yang, while the court could strike the mandatory registration requirement as an unauthorized sentence, it did not have jurisdiction to then order discretionary registration.

In *Hofsheier*, *supra*, 37 Cal.4th 1185, our Supreme Court held that mandatory lifetime registration as a sex offender, pursuant to former section 290, subdivision (a)(1)(A) (now § 290, subd. (c)), for an adult defendant convicted of felony oral copulation with a 16-year-old (§ 288a, subd. (b)(1)) violated equal protection because conviction of sexual intercourse with a 16-year-old (§ 261.5, subd. (c)) did not require mandatory registration. (*Id.* at p. 1207.) The court remanded the matter to the appellate court to determine if the defendant was subject to the discretionary registration requirement, pursuant to former section 290, subdivision (a)(2)(E) (now § 290.006). (*Hofsheier*, at p. 1209.)

In *People v. Garcia* (2008) 161 Cal.App.4th 475, 482, disapproved on another ground in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, footnote 4 (*Picklesimer*), the appellate court concluded that the holding in *Hofsheier* is also applicable to younger victims, stating: "If there is no rational reason for this disparate treatment when the victim is 16 years old, there can be no rational reason for the disparate treatment when the victim is even younger, 14 years old."<sup>4</sup> The parties agree that the holdings in

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<sup>4</sup> The *Garcia* court thus held that *Hofsheier* is applicable whether the conviction is under section 288a, subdivision (b)(1) [oral copulation with a person under 18 years of

*Hofsheier* and *Garcia* apply to the circumstances of the present case. We conclude that the mandatory sex offender registration requirement violated Yang’s equal protection rights. (See *Hofsheier, supra*, 37 Cal.4th at p. 1208; *People v. Garcia*, at p. 482.)<sup>5</sup>

Yang asserts that he moved to correct an unauthorized sentence, which may be corrected at any time. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.) In such a situation, according to Yang, the court did not have the power to conduct a new sentencing hearing, but was only permitted to correct the unauthorized portion of the sentence by striking the mandatory registration requirement. Thus, Yang avers, the court did not have jurisdiction to order discretionary registration under section 290.006.<sup>6</sup>

The California Supreme Court very recently resolved the uncertainty regarding the appropriate procedural method for asserting a *Hofsheier* claim (i.e., a claim for “relief from mandatory lifetime sex offender registration based on equal protection”) for people who were convicted under section 288a, subdivision (b)(1), before *Hofsheier* was decided. (*Picklesimer, supra*, 48 Cal.4th at p. 335.) The court in *Picklesimer* held that a “freestanding postjudgment motion for *Hofsheier* relief . . . is not cognizable . . .” (*Picklesimer*, at p. 335.) That is because, in most cases, “ ‘after the judgment has become

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age], or subdivision (b)(2) [oral copulation by a person over 21 with a person under 16 years of age]. (*Garcia, supra*, 161 Cal.App.4th at p. 482.) Respondent has stated that its policy is to accept this conclusion in *Garcia*.

<sup>5</sup> Both parties note that, in the present case, the record does not specify under which subparagraph Yang was charged and convicted, merely stating “section 288a, subdivision (b).” However, since the record does show that the victim was 14 years old and Yang was 18 years old at the time of the offenses, the parties agree that the conviction must be for subdivision (b)(1) of section 288a.

<sup>6</sup> On April 8, 2009, we deferred further consideration of Yang’s appeal and writ petition pending our Supreme Court’s decision in *In re E.J.*, which was decided on February 1, 2010. (See *In re E.J.* (2010) 47 Cal.4th 1258.) We also stayed enforcement of the residency restrictions contained in section 3003.5, subdivision (b), against Yang. After the decision in *In re E.J.*, at our request, the parties submitted supplemental briefing addressing the impact of that case on the present matter. In their supplemental briefs, the parties also discussed the potential impact of another recent Supreme Court decision, *Picklesimer, supra*, 48 Cal.4th 330, on this case.

final, there is nothing pending to which a motion may attach.’ ” (*Id.* at p. 337, quoting *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 76-77 (*Lewis*).) The *Picklesimer* court also expressly rejected the argument that the defendant’s obligation to register was part of an unauthorized sentence, which the trial court would have had jurisdiction to correct at any time, explaining that “the obligation to register is a separate consequence of Picklesimer’s conviction automatically imposed as a matter of law.” (*Picklesimer*, at p. 338.)

Nevertheless, “[t]hat a postjudgment motion is unavailable does not mean dismissal is mandated. As the People concede, every right must have a remedy. [Citation.]” (*Picklesimer, supra*, 48 Cal.4th at p. 339.) The court then explained that, “[f]or a defendant still in actual or constructive custody, a petition for writ of habeas corpus in the trial court is the preferred method by which to challenge circumstances or actions declared unconstitutional after the defendant’s conviction became final. [Citations.] But once a defendant has been released and is no longer subject to parole or probation, he or she is no longer in constructive custody and this avenue is foreclosed. [Citation.]” (*Ibid.*)

For out-of-custody defendants such as *Picklesimer*, the court concluded that “the appropriate vehicle for seeking *Hofsheier* relief is a petition for writ of mandate filed in the trial court. [Citations.] Unlike a petition for writ of habeas corpus, a petition for writ of mandate does not require ongoing custody; unlike a postjudgment motion, it is an independent proceeding that vests the trial court with jurisdiction to act. [Citations.]” *Picklesimer, supra*, 48 Cal.4th at p. 339; see Code Civ. Proc., § 1085.)<sup>7</sup> The court

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<sup>7</sup> “ ‘Code of Civil Procedure section 1085 permits the issuance of a writ of mandate “to compel the performance of an act which the law specially enjoins.” [Citation.] The writ will lie where the petitioner has no plain, speedy and adequate alternative remedy, the respondent has a clear, present and usually ministerial duty to perform, and the petitioner has a clear, present and beneficial right to performance. [Citations.] Mandate is not available to compel the exercise of discretion on the part of a public official, but it is available to correct an abuse of discretion.’ [Citation.]” (*In re Stier* (2007) 152 Cal.App.4th 63, 84.)

explained that, assuming an out-of-custody defendant’s motion for relief “meets or can be amended to meet the prerequisites for a petition for writ of mandate, a court in its discretion may treat a motion or a petition for a different writ as a mislabeled petition for writ of mandate. [Citations.]” (*Picklesimer*, at pp. 340-341.) In such a case, the court would conduct “an after-the-fact discretionary determination [pursuant to section 290.006] whether removal [from the state sex offender registry] is appropriate.” (*Id.* at p. 343.)

In addition, our Supreme Court explained that whether it is proper for an appellate court to treat an appeal from a freestanding *Hofsheier* motion as a petition for writ of mandate in the first instance, or whether the trial court should first address the merits, “depends in large part on whether the appellate record is sufficient to determine that all potential factual issues are undisputed . . . .” (*Picklesimer*, *supra*, 48 Cal.4th at p. 341.) The court in *Picklesimer* concluded that the record in that case was incomplete, in that no part of the original proceedings was included in the record on appeal. It therefore could not “determine whether this is a case in which there is ‘no factual basis for the exercise of discretion’ because ‘the existing facts unequivocally require one particular action.’ [Citation.]” (*Id.* at p. 345, quoting *Lewis*, *supra*, 169 Cal.App.4th at p. 77 [in which record on appeal *was* sufficient for appellate court to determine petitioner’s right to relief on merits].) For that reason, the *Picklesimer* court declined to exercise its discretion to convert the defendant’s motion to a petition for writ of mandate and decide it on the merits. (*Picklesimer*, at p. 345, citing *In re Stier*, *supra*, 152 Cal.App.4th at pp. 84-85 [in which appellate court declined to treat petition for writ of habeas corpus as petition for writ of mandate because record on appeal was incomplete and, therefore, court could not decide case on merits].)

In the present case, Yang has both filed an appeal and petitioned this court alternatively for a writ of habeas corpus, mandate and/or prohibition. Unlike in *Picklesimer*, the evidence presented at the contested hearing in the trial court to determine whether Yang was subject to discretionary registration—including the preliminary hearing transcript and a probation report that was requested by defense counsel—is

contained in the record on appeal. (See pt. II, B, 1, *post* [trial court considered all relevant evidence in record in determining that Yang was subject to discretionary registration, under section 290.006].) Thus we *are* able to “determine whether this is a case in which there is ‘no [factual] basis for the exercise of discretion . . . .’ [Citation.]” (*Picklesimer, supra*, 38 Cal.4th at p. 345, quoting *Lewis, supra*, 169 Cal.App.4th at p. 77.)

Therefore, in addition to addressing Yang’s writ petition, which we deem a petition for writ of mandate, we exercise our discretion to convert his so-called appeal into a petition for writ of mandate and decide it on the merits. (See *Lewis, supra*, 169 Cal.App.4th at p. 77; compare *Picklesimer, supra*, 48 Cal.4th at p. 345.)

## **II. The Trial Court’s Ruling Regarding Discretionary Registration**

Yang contends that even if the court had jurisdiction to impose the discretionary registration requirement, (1) he was denied a fair hearing on his motion, and (2) the court, in exercising its discretion, failed to apply the proper standard.

### **A. Trial Court Background**

Yang pleaded guilty on April 26, 2004. At his sentencing hearing on that same date, he was ordered to register as a sex offender pursuant to the mandatory registration requirement set forth in former section 290, subdivision (a)(1)(A) (now subd. (c) of § 290). Then, on November 20, 2006, while in prison, Yang moved for a correction of sentence to delete the registration requirement.

At the hearings on the motion, after finding that the mandatory registration requirement should be stricken under *Hofsheier*, the trial court addressed whether discretionary registration was appropriate. In deciding whether to order discretionary registration, the court considered all of the evidence presented at the preliminary hearing, and also considered a probation report requested by defense counsel.

Ultimately, the court exercised its discretion to require Yang to register as a sex offender, explaining: “[G]iven the totality of everything that’s before the Court . . . [the court] should exercise its—its discretion under [former section] 290(a)(2)(e) [(now § 290.006)] given what the underlying circumstances were of the offense, that they were

not of the—quote, for lack of a better term, ‘garden variety’ sexual contact between someone who happened to be over the age of [18] and someone who happened to be under the age of 18. [¶] So the Court will continue the registration requirement in this particular case, having weighed for and against.”

### **B. Legal Analysis**

Section 290.006 provides: “Any person ordered by any court to register pursuant to the [Sex Offender Registration] Act for any offense not included specifically in subdivision (c) of Section 290 [(formerly § 290, subd. (a)(1)(A))], shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.”<sup>8</sup>

#### **1. Alleged Denial of a Fair Hearing**

Yang argues that he was denied a fair hearing on his request to correct the sentence to eliminate the mandatory registration requirement because the trial court relied solely on evidence of the complaining witness’s description of events from the preliminary hearing transcript. According to Yang, the court failed to also consider contrary statements by other witnesses as well as Jane Doe’s own later concessions, as reflected in other parts of the preliminary hearing transcript and Detective Parris’s reports.

The record of the hearings on Yang’s motion reflects, however, that the court considered all of the evidence presented at the preliminary hearing, as well as the probation report requested by defense counsel,<sup>9</sup> in making its determination under section 290.006. The court made clear that, in deciding the matter, it had read and

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<sup>8</sup> Former section 290, subdivision (a)(2)(E), in effect when *Hofsheier* was decided and when Yang filed his motion to correct the sentence, did not differ in any substantive way from current section 290.006.

<sup>9</sup> In requesting the probation report, counsel stated, “I’m not asking for Probation to write a recommendation or to try and determine what actually happened or anything of that sort. It’s just what is his—this young man’s history, what has he done in the past so that that can be entered into the mix for the Court to enter [*sic*] its discretion.”

considered the entire transcript, including all of the statements by Jane Doe and other witnesses, some of which contradicted Jane’s initial statements or were otherwise unfavorable to her version of events. For example, the court stated: “The defendant did stipulate that the evidence presented during the preliminary hearing could serve as the factual basis. The Court has read that transcript. That’s from November 19th and November 20th, 2003, and [I] find that clearly in its totality of all the evidence presented there there [sic] is no question in the Court’s mind that Mr. Yang’s acts were a result of or for the purposes of sexual gratification.”<sup>10</sup>

We conclude that Yang was not denied a fair hearing.

## ***2. The Trial Court’s Alleged Failure to Apply the Proper Standard in Ordering Discretionary Registration***

Yang also argues that the trial court applied an erroneous standard when it exercised its discretion to order him to register as a sex offender.

In *Hofsheier*, *supra*, 37 Cal.4th 1185, our Supreme Court explained that, to implement the requirements of former section 290, subdivision (a)(2)(E), “the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case.” (*Hofsheier*, at p. 1197.)

According to Yang, while the trial court properly applied the first step set forth in section 290.006 and *Hofsheier* when it found that the oral copulation “was committed as

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<sup>10</sup> We also note that Yang never requested that the court consider additional evidence, other than that it obtain a report from the probation department regarding Yang’s criminal history.

a result of sexual compulsion or for the purposes of sexual gratification,” it applied an erroneous standard when it considered the second step. We disagree.

In *Hofsheier*, *supra*, 37 Cal.4th 1185, the court explained that “[t]he purpose of section 290’s registration requirement is to protect the public against repeat offenders.” (*Id.* at p. 1204, fn. 6.) “No doubt there are some persons convicted of oral copulation with 16- or 17-year-old minors for whom lifetime registration is appropriate because their conduct and criminal history suggest a high risk of recidivism, but the same can be said of some individuals convicted of unlawful intercourse with minors in that same age group. The existence of such potential recidivists under both statutes argues for discretionary registration depending on the facts of the case rather than mandatory registration for all persons convicted under section 288a(b)(1).” (*Hofsheier*, at p. 1204.)

Here, the reasons the trial court gave for ordering lifetime registration for Yang clearly are based on the fact that Yang’s conduct with Jane Doe and his history suggested a high risk of recidivism. First, the court noted, regarding the circumstances of the oral copulation conviction for which registration could be ordered: “It wasn’t a young adult in a car or somewhere else having an intimate relationship with a person that turned out to be under the age of 18. There’s no question that this was a group assault. No matter where it occurred. It’s a different nature of a sexual conduct here.”<sup>11</sup> Second, the court

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<sup>11</sup> Yang asserts that the court improperly used facts related to the dismissed forcible rape count in determining this issue. Aside from the fact that many of the facts applicable to the rape count were also applicable to the oral copulation counts, the court indicated that it was focused on the facts related to the oral copulation when it made its ruling. For example, at one point, the court stated: “[B]ased upon [the preliminary hearing] transcript, the minor, 14, described what occurred to her, including the oral copulation by this defendant in a setting of multiple males . . . . And so I saw it as more than just as consensual as you’re [defense counsel] describing. Although, the statute itself, in order to be found guilty of—or he pled guilty, oral copulation wouldn’t require force, it appeared to the Court that the totality of the circumstances in which this child, 14 years old, Mr. Yang’s involvement in oral copulation with her separate from actual penetration with her, to me, showed something much more different than the type of intercourse [or oral copulation] between someone over the age of 18 with a younger person . . . . This was a setting at the docks, the person removed to another area. To me,

observed that the probation report—which indicated that Yang had been expelled from high school at age 17 for, as Yang himself put it, “spitting at a female staff member and hitting a female staff member,” and had been arrested while on parole—“did indicate to the Court some concern about his ability to comply with societal rules.”

This discussion by the court does not demonstrate, as Yang argues, that the court simply believed that Yang’s bad behavior justified requiring Yang to register. The trial court’s discussion of its reasons for ordering Yang to register—including both facts related to the offense itself and issues raised about Yang in the probation report—indicates the court’s concern that Yang’s “conduct and criminal history suggest a high risk of recidivism.” (*Hofsheier, supra*, 37 Cal.4th at p. 1204.)<sup>12</sup> The court thus properly exercised its discretion in determining that lifetime registration was appropriate in this case. (See *Hofsheier, supra*, 37 Cal.4th at p. 1197; § 290.006.)

### **III. Right to a Jury Trial on Facts Supporting Sex Offender Registration**

Yang further claims that the trial court’s discretionary order that he register as a sex offender violated his constitutional rights to a jury trial and proof beyond a reasonable doubt of facts used to increase his punishment beyond the statutory maximum, in violation of *Apprendi, supra*, 530 U.S. 466 and its progeny. According to Yang, the sex offender residency restrictions contained in the Sexual Predator Punishment and Control Act: Jessica’s Law (§ 3003.5, subd. (b), added by Prop. 83, as approved by

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the whole picture is not the usual having someone over the age of 18 having sex with a 14-year-old and consensual type of, you know, like each other sort of thing and shouldn’t be doing this.”

<sup>12</sup> Although *Hofsheier* makes plain that protecting the public against repeat offenders is the purpose of the sex offender registration requirement (37 Cal.4th at p. 1204 & fn. 6), contrary to Yang’s argument, nothing in section 290.006 or *Hofsheier* mandates that a trial court specifically state on the record that a particular defendant is “highly likely” to commit sex crimes in the future to justify ordering discretionary registration.

voters, Gen. Elec. (Nov. 7, 2006)) (Jessica’s Law),<sup>13</sup> constitute punishment and, therefore, the facts required to impose those restrictions (see § 290.006) must now be found beyond a reasonable doubt by a jury. (See *Apprendi*, *supra*, 530 U.S. 466.)

Two recent California Supreme Court cases shed light on this issue. First, in *In re E.J.*, *supra*, 47 Cal.4th 1258, the court held, in a challenge of Jessica’s Law by four sex offenders who were on parole for subsequent, nonsexual offenses, that enforcement of residency restrictions against them was “a prospective, not a retrospective, application of that law.” (*Id.* at p. 1279, fn. omitted.) As the court explained: “[G]iven that petitioners were released on their current parole terms *after* the effective date of Jessica’s Law, petitioners knew, or should have known, that they would be subject to a reportable parole violation if they moved into housing that did not comply with the newly enacted residency restrictions that took effect prior to their release. . . . Although they fall under the new restrictions by virtue of their *status* as registered sex offenders who have been released on parole, they are not being ‘additionally punished’ for commission of the original sex offenses that gave rise to that status. Rather, petitioners are being subjected to new restrictions on where they may reside while on their *current parole*—restrictions clearly intended to operate and protect the public *in the present*, not to serve as additional punishment for past crimes.” (*Id.* at pp. 1277-1278.)

The court further held that the residency restrictions did not constitute an ex post facto law when applied to “conduct occurring after its effective date because it does not additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee’s status as a lifetime registrant under section 290. [Citations.]” (*In re E.J.*, *supra*, 47 Cal.4th. at p. 1280.)<sup>14</sup>

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<sup>13</sup> Subdivision (b) of section 3003.5 provides: “Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.” That section became operative on November 8, 2006.

<sup>14</sup> The court did not decide the parolees’ constitutional claims that Jessica’s Law “is an unreasonable, vague and overbroad parole condition that infringes on various state and federal constitutional rights, including their privacy rights, property rights, right to

Thereafter, in *Picklesimer*, *supra*, 48 Cal.4th 330, our Supreme Court addressed, inter alia, a contention similar to Yang's: that application of section 290.006 is unlawful because it permits imposition of additional punishment based on findings of fact by a trial court rather than a jury, in violation of *Apprendi*. The court first observed that " 'sex offender registration is not considered a form of punishment under the state or federal Constitution.' [Citations.]" (*Picklesimer*, at pp. 343-344.) The court then discussed Picklesimer's claim that, nonetheless, the residency restrictions in Jessica's Law *are* punishment. The court rejected this claim, explaining: "Picklesimer cannot show a potential *Apprendi* violation on this basis. If Proposition 83's [i.e., Jessica's Law's] restrictions do not amount to punishment for his original crimes, there is no *Apprendi* problem and no right to a jury trial. Conversely, if Proposition 83's restrictions were to be considered punishment for his original offenses (but see *In re E.J.*, *supra*, 47 Cal.4th at pp. 1271-1280]), they could not under the state and federal ex post facto clauses be constitutionally applied to Picklesimer, whose crimes all along predate the approval of Proposition 83. [Citations.] In either event, there is no constitutional bar to having a judge exercise his or her discretion to determine whether Picklesimer should continue to be subject to registration." (*Picklesimer*, at p. 344.)

Applying *Picklesimer* to the present case, Yang, like Picklesimer, cannot show an *Apprendi* violation. If Jessica's Law's residency restrictions do not amount to punishment for his original offenses, Yang possesses no jury trial right. (See *Picklesimer*, *supra*, 48 Cal.4th at p. 344.) On the other hand, should those restrictions be considered punishment for Yang's original crimes, given that—like Picklesimer—his offenses predate Jessica's Law, they would violate the state and federal Constitutions' ex post facto clauses, and could not be applied to him. (See *ibid.*) Thus, under *Picklesimer*,

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intrastate travel, and their substantive due process rights under the federal Constitution." (*In re E.J.*, *supra*, 47 Cal.4th at p. 1280.) Because these claims presented "complex 'as applied' challenges to enforcement of the new residency restrictions as parole violations in the particular jurisdictions to which each petitioner [had] been paroled," the court concluded that the trial courts would have to conduct evidentiary hearings to establish the facts necessary to decide each parolee's claim. (*Id.* at pp. 1281, 1283.)

the trial court in this case was not constitutionally precluded from determining whether Yang should continue to be subject to registration pursuant to section 290.006. (See *ibid.*)<sup>15</sup>

***DISPOSITION***

Yang's appeal is deemed a petition for writ of mandate, as is his consolidated "Petition for Writ of Habeas Corpus, Mandate and/or Prohibition," and the petition is denied. The April 8, 2009 order staying enforcement of the residency restrictions contained in section 3003.5, subdivision (b), against Yang, is vacated.

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.

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<sup>15</sup> In light of this conclusion, we need not address the specific evidence, submitted by the parties with requests for judicial notice, regarding whether the residency restrictions in Jessica's Law are punitive when specifically applied to Yang's situation. Accordingly, all of the related requests for judicial notice are denied.